

**DEPARTMENT OF STATE REVENUE**  
**LETTER OF FINDINGS: 04-0154**  
**Sales and Use Tax**  
**For Tax Periods 2000-2002**

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**ISSUES**

**I.     Sales and Use Tax—Advertising**

**Authority:** Ind. Code § 6-2.5-4-10; Information Bulletin # 59.

Taxpayer protests the imposition of sales tax with respect to its provision of advertising space.

**II.    Sales and Use Tax—Imposition**

**Authority:** Ind. Code § 6-2.5-2-1; Ind. Code § 6-2.5-3-7; Ind. Code § 6-2.5-3-8.

Taxpayer protests the imposition of sales tax with respect to transactions where the purchaser self-assesses use tax.

**III.   Sales and Use Tax—Inclusion of sales**

**Authority:** Ind. Code § 6-8.1-5-1.

Taxpayer protests the imposition of sales tax with respect to amounts that Taxpayer claims were erroneously assessed twice, along with the amount of sales that the Department claimed Taxpayer underreported.

**IV.    Tax Administration: Negligence Penalty**

**Authority:** Ind. Code § 6-8.1-10-2.1; 45 IAC 15-11-2.

Taxpayer protests the assessment of a negligence penalty.

**STATEMENT OF FACTS**

Taxpayer is a company engaged in the rental of advertising space. During the years at question, Taxpayer sold rental space at various Indiana locations. Taxpayer did not charge sales tax on its rentals during the years in question with respect to several advertisers. The Department assessed

sales tax on these rentals, along with another rental upon which Taxpayer claims the purchaser paid use tax. Taxpayer also claims that the auditor effectively double-counted certain transactions, and erroneously assessed certain underreported sales. Taxpayer also protests the negligence penalty imposed by the Department.

**I.     Sales and Use Tax—Advertising**

**DISCUSSION**

First, Taxpayer argues that its provision of advertising space constituted a service, rather than a rental of space. The crucial difference is that the rental is taxable under Ind. Code § 6-2.5-4-10, while the provision of a service is not taxable.

Here the arrangement can be described as follows: an advertiser provides a copy of its advertisement to Taxpayer. Taxpayer, upon review of the advertisement for content and suitability, installs the advertisement in its display cases. Cleaning and maintenance of the display cases may be done by Taxpayer, though Taxpayer apparently contracts for the performance of that work.

According to Information Bulletin # 59,

The key element in determining whether the transaction is a rental or a service is who controls the property. If the person paying for the use of the advertising space controls the space, the transaction is a rental of the space and is taxable. If the person using the property does not control the property then the transaction is a service.

The person paying for the use of the space has control when that person can determine the location of the advertising space or has the right to direct how the advertising space will be used. The person using the space must have exclusive use of the space. Other factors indicating control are whether the customer provides upkeep and maintenance of the space, and whether the customer pays for the posting of the advertising material.

Taxpayer's arrangement leads the Department to conclude that the sales in question are those of services rather than rentals of tangible personal property, and accordingly not subject to tax.

**FINDING**

Taxpayer's protest is sustained.

**II.    Sales and Use Tax—Imposition**

**DISCUSSION**

Second, Taxpayer argues that it should not be assessed sales tax with respect to one of its clients. Taxpayer notes that the client pays use tax with respect to the client's purchase of advertising

from Taxpayer, and has provided a statement from the client that the client pays use tax with respect to the advertising.

Under Ind. Code § 6-2.5-2-1(b), a person purchasing tangible personal property in a retail transaction shall pay the sales tax to the retail merchant. To avoid collection duties as assigned under the statute, a retail merchant must provide evidence of exemption, either by producing a Department exemption certificate from the purchaser or other evidence of the purchaser's exemption. Ind. Code § 6-2.5-3-7(b). The offsetting credit regime under Ind. Code § 6-2.5-3-8 provides a credit for a purchaser for taxes paid to the merchant, not the other way around. Accordingly, Taxpayer, who is required to collect sales tax in this situation, is denied.

### **FINDING**

Taxpayer's protest is denied.

### **III. Sales and Use Tax—Inclusion of sales**

### **DISCUSSION**

Third, Taxpayer protests the assessment with respect to three items that Taxpayer maintains were erroneously included in the assessment for the first quarter of 2000. Taxpayer argues that its records of the sales in question kept a record of three supplemental sales journals for various locations in Indiana. However, Taxpayer argues, the Department added the amounts of the three items to the amounts that Taxpayer originally reported and which had already included the items in controversy. After review, Taxpayer has provided sufficient information to conclude that the amounts in controversy were added in error.

Fourth, Taxpayer protests the assessment of sales tax with respect to underreported sales for 2002. In particular, Taxpayer protests the difference between its records and Department's records. Further, Taxpayer argues that one billing represented periods in 2003, outside the scope of the audit. Here, Taxpayer has not provided sufficient information to conclude that the Department's assessment-presumably correct, per Ind. Code § 6-8.1-5-1(a)- was incorrect.

### **FINDING**

Taxpayer's protest is sustained with respect to three items that it maintains were included twice for the first quarter of 2000. Taxpayer is denied with respect to its 2002 underreporting.

### **IV. Tax Administration: Negligence Penalty**

The Department may impose a ten percent (10%) negligence penalty. Ind. Code § 6-8.1-10-2.1 and 45 IAC 15-11-2. Taxpayer's failure to timely file income tax returns, generally, will result in penalty assessment. Ind. Code § 6-8.1-10-2.1(a)(1). The Department, however, may waive this penalty if the taxpayer can establish that its failure to file "was due to reasonable cause and not due to negligence." 45 IAC 15-11-2(c). A taxpayer may demonstrate reasonable cause by

showing “that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed....” *Id.* Taxpayer has not made the necessary showing in this case.

**FINDING**

Taxpayer’s protest is denied.

JR/JM 051210